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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. [redacted] 70-72

UNITED STATES OF AMERICA, *Petitioner,*

vs.

CHAS. PFIZER & CO., INC., AMERICAN CYANAMID COMPANY and BRISTOL-MEYERS COMPANY, *Respondents.*

BRIEF OF THE STATES OF CALIFORNIA, HAWAII, KANSAS, NORTH CAROLINA, OREGON, UTAH AND WASHINGTON AS AMICI CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the Supreme Court
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OCTOBER TERM, 1970

No. 1286

UNITED STATES OF AMERICA,
Petitioner,
vs.
CHAS. PFIZER & CO., INC., AMERICAN CYANAMID COMPANY and BRISTOL-MEYERS COMPANY,
Respondents.

BRIEF OF THE STATES OF CALIFORNIA, HAWAII, KANSAS, NORTH CAROLINA, OREGON, UTAH AND WASHINGTON AS AMICI CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The States of California, Hawaii, Kansas, North Carolina, Oregon, Utah and Washington file this brief in support of the petition of the United States seeking a writ of certiorari. This brief is submitted under the provisions of Rule 42.4 of the Rules of the Supreme Court.

The States' interest in this case is grounded on the actual and potential impact of the Second Circuit decision on the development of the criminal aspects of state antitrust laws. In addition, the States are concerned with the possibility that the Second Circuit decision may be applied to treble damage actions.

STATEMENT

Numerous states have antitrust laws which provide for criminal sanctions. In recent years, states have greatly increased their activities in this area and have created or expanded units devoted to antitrust enforcement procedures. This increased activity is, however, still in its incipiency. State antitrust laws are, in most cases, still in an early stage of development compared to federal law. Due to both historical development and the very large number of federal decisions, federal law has achieved primacy in the antitrust field.

In any state criminal prosecution, it can be assumed that the Second Circuit decision, if allowed to stand, will be controlling.

Also, there is the possibility, particularly in state courts with their paucity of antitrust experience, that this decision in a criminal case will be applied in subsequent civil litigation. This could have a chilling effect on the bringing of treble damage actions by states and thus reduce the efficacy of these private enforcement actions.

REASONS FOR GRANTING THE WRIT

The States fully support the arguments of the Solicitor General and join in requesting that the petition for a writ of certiorari be granted.

In addition, the States would argue that the Second Circuit's restrictive opinion would have an inhibiting effect on every aspect of antitrust law enforcement.

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1. STATE ANTITRUST LAWS ARE DIRECTLY RELATED TO FEDERAL ANTITRUST LAW.

Some state antitrust laws are patterned directly on the federal statutes. The State of Washington's Unfair Practices Act is identical to the Sherman and Clayton Acts, except for the interstate commerce requirement in those acts (Chapter 19.86, Revised Code of Washington). The States of Hawaii, North Carolina and Utah also have anti-competitive statutes which are identical to the federal statutes, save for the interstate commerce requirement. For such states, federal decisions interpreting identical, or nearly identical, language will clearly carry great weight with state courts. In fact, Chapter 19.86.920 of the Revised Code of Washington provides that it is the intent of the legislature that courts in interpreting the Unfair Practices Act should be guided by decisions of federal courts interpreting federal statutes which deal with the same matters. In a case in which it was argued that the federal government had preempted the antitrust field, the United States Department of Justice filed an amicus curiae brief taking

the position that there was no pre-emption. The Washington court found a lack of pre-emption. *Washington v. Sterling Theaters Co.*, 64 Wash.2d 761, 394 P.2d 226 (1964).

Even where the state language varies from the federal statutes, the federal decisions may be applicable. The California Supreme Court has held federal decisions to be applicable in interpreting California's Cartwright Act (Business and Professions Code section 16700 et seq.) even though its language varies almost totally from the federal language. *Chicago Title Insurance Co. v. Great Western Financial Corp.*, 69 Cal.2d 305, 70 Cal.Rptr. 849, 444 P.2d 481 (1968).

These acts provide criminal sanctions. California's Business and Professions Code, section 16755(a) provides:

> "Any violation of this chapter is a conspiracy against trade, and any person who engages in any such conspiracy or takes part therein, or aids or advises in its commission, or who as principal, manager, director, agent, servant or employee, or in any other capacity, knowingly carries out any of the stipulations, purposes, prices, rates, or furnishes any information to assist in carrying out such purposes, or orders thereunder or in pursuance thereof, is punishable by a fine of not less than five hundred dollars ($500) nor more than fifty thousand dollars ($50,000) or by imprisonment for not more than one year, or by both such fine and imprisonment."

The Hawaii, North Carolina, Utah and Washington statutes provide for the same criminal remedies as

the federal acts.[1] When future criminal prosecutions are brought or reviewed under these state statutes, the Second Circuit decision almost certainly will be considered to be controlling by state courts. Its restrictive effect will encompass state as well as federal criminal prosecutions.

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2. FEDERAL DECISIONS ARE, AS A PRACTICAL MATTER, BINDING ON STATE ENFORCEMENT AGENCIES.

The impact of federal decisions on state proceedings is greater than indicated by statutory language or state court decisions. Federal decisions are more than applicable to state proceedings; they are, in effect, controlling. While state activity is increasing greatly in the antitrust field, it is still small in relation to the quantity and history of federal activity. Very frequently there are no state decisions on a point which is well settled in federal law.

Because these conditions will tend to give great, if not controlling, weight to applicable federal decisions, undoubtedly it will be very difficult to get a state court to reach a different conclusion than that previously reached by a United States Court of Appeals.

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3. STATE ANTITRUST LAW IS INTERSTITIAL IN RELATION TO FEDERAL ANTITRUST LAW.

State and federal antitrust laws have overlapping coverage in many areas but state law alone controls

[1] In 1968, North Carolina successfully prosecuted a violator under the state antitrust law.

where the violations do not affect interstate commerce. 15 U.S.C. §§1 and 2; *United States v. Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150, 224 (1940). Thus, a restrictive federal decision affects even those combinations in restraint of trade which would not be subject to federal law.

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4. THE SECOND CIRCUIT DECISION MAY BE MADE APPLICABLE TO CIVIL PROCEEDINGS.

Even though this is a criminal case, its rule may well be applied to pending or future civil antitrust actions.[2]

Treble damage actions are intended to be private enforcement actions. As Justice White said in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969):

> "Moreover, the purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws."

A decision which would make successful prosecutions of such actions more difficult would seriously restrict total enforcement of the antitrust laws.

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[2]The criminal case here in question is in fact the progenitor of a number of currently pending civil treble damage actions. These actions have been brought by a variety of plaintiffs, ranging from governmental entities, through agricultural purchasers of tetracycline to competitors and insurers. Pursuant to court order, plaintiffs in these actions have formed a national steering committee. That steering committee has indicated that it fully supports both this brief and the brief of the Solicitor General.

State interest in treble damage cases has increased greatly since the electrical conspiracy cases, The entry of the states as well financed plaintiffs with very large claims has given a new efficacy to the concept of treble damage actions as vehicles of private enforcement of the antitrust laws.

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5. THE SECOND CIRCUIT DECISION DOES NOT PROVIDE SUFFICIENT GUIDELINES FOR FUTURE RULINGS BY TRIAL COURTS. -

The States fully support and agree with the arguments of the Solicitor General. However, the States would particularly stress the lack of guidelines provided by the Second Circuit decision. It is respectfully submitted that the decision is essentially conclusionary in reversing the trial court decision and does not provide the standards necessary for the guidance of trial court judges in the future.

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6. BECAUSE OF THE GREAT AND WIDESPREAD IMPACT OF FEDERAL DECISIONS, THOSE WHICH RESTRICT ENFORCEMENT OF THE ANTITRUST LAWS SHOULD BE CAREFULLY SCRUTINIZED.

The impact of federal antitrust decisions is both great and far reaching. They pervade every aspect of federal, state and private enforcement of the antitrust laws.

The petition of the Solicitor General has analyzed the Second Circuit decision and has succinctly stated

the problem presented by that decision.[3] The decision is clearly restrictive in nature and would inhibit all future enforcement of antitrust laws where the enforcement is to be based on circumstantial evidence.

While all appellate antitrust cases are of interest to the antitrust bar, we do not argue that they are all proper subjects for the granting of writs of certiorari. However, those cases which would place new barriers in the way of effective enforcement of the antitrust laws by the federal or state governments should be carefully examined before they are allowed to stand.

CONCLUSION

For the reasons set forth above, these States respectfully urge that the petition of the United States for a writ of certiorari be granted.

Dated, February 25, 1971.

Respectfully submitted,

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[3] "As we show below, the instructions that the court of appeals' decision requires a district judge to give in cases of this type would place an unwarranted and serious burden upon the government in the prosecution of criminal antitrust cases involving price fixing and other restrictive practices in oligopolistic industries, where there rarely is direct proof of the conspiracy and the government almost invariably has to rely upon circumstantial evidence." Petitioner's Brief for Certiorari at 14.

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